# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD Washington D.C.

2 SISTERS FOOD GROUP, INC

and

Cases 21-CA-38915 21-CA-38932

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 1167

2 SISTERS FOOD GROUP, INC

Employer

and

Case 21-RC-21137

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 1167

Petitioner

COUNSEL FOR THE ACTING GENERAL COUNSEL'S OPPOSITION TO FRESH & EASY NEIGHBORHOOD MARKET, INC.'S MOTION TO INTERVENE AND SUPPLEMENT THE RECORD

#### I. Introduction

On June 10, 2010, Administrative Law Judge Lana H. Parke ("ALJ") issued her decision in these cases, making findings of fact and conclusions of law that 2 Sisters Food Group, Inc. ("Respondent") violated Section 8(a)(1) and (3) of the Act by terminating employee Xonia Trespalacios ("Trespalacios"), and violated Section 8(a)(1) of the Act by maintaining overbroad work rules and a mandatory arbitration rule that requires employees to waive their rights to file charges with the Board. The ALJ also found that Trespalacios' termination constituted objectionable conduct warranting that the election for union representation conducted on July 17, 2009, be set aside. Thus, the ALJ recommended that Case 21-RC-21137 be remanded to the Regional Director of Region 21 for the purpose of conducting a rerun election.

On July 23, 2010, the Respondent filed 35 exceptions to the ALJ's decision, and a brief in support, challenging essentially all of the ALJ's findings of fact, credibility resolutions, and legal conclusions.\(^1\) On July 26, 2010, the General Counsel filed limited exceptions to the ALJ's decision, and a brief in support. That same day, Fresh & Easy Neighborhood Market, Inc. ("Fresh & Easy") filed a Motion to Intervene and Supplement the Record ("the motion").

## II. The motion should be denied and the declaration of Hugh Cousins should be rejected.

Fresh & Easy moves to introduce into the record the declaration of Hugh Cousins ("Cousins") attached to the motion, in which he states that on June 28, 2010, Fresh & Easy purchased all of the assets of the Respondent, and hired the majority of its

<sup>&</sup>lt;sup>1</sup> Answering briefs are due on August 30, 2010.

employees.<sup>2</sup> However, the alleged asset purchase and the question of whether Fresh & Easy is a successor to the Respondent are not part of the underlying proceeding. Those issues have not been litigated by the parties. Any consideration of Cousins' declaration would effectively deny the Acting General Counsel and the Charging Party the opportunity to cross-examine Cousins and other witnesses. Therefore, the motion should be denied and Cousins' declaration should be rejected.

The Board should instead rely solely on the record that was established at the hearing to decide these cases. If the Board adopts the ALJ's recommended order, the issues regarding whether the Respondent has ceased to exist and whether there is a predecessor/successor relationship between the Respondent and Fresh & Easy can be fully explored in a compliance proceeding or in a representation proceeding, as becomes necessary. There, the relevant parties to each proceeding can be afforded full opportunity to present their positions and develop a complete record as to these issues. Thus, the motion should be denied, and the issues raised in that document should not be considered by the Board at the present time.

### III. A successor employer may be the subject of a rerun election notwithstanding the existence of a stipulated election agreement.

If the Board chooses to address the motion at this time, the relevant case authority shows that the position of Fresh & Easy is without merit. It claims that even if it is a successor to the Respondent, the Board is precluded from ordering a rerun election because Fresh & Easy was not a party to the stipulated election agreement between the Respondent and the Charging Party. However, the Board has held that a successor employer is the proper subject of the organizational interests of the predecessor

<sup>&</sup>lt;sup>2</sup> No explanation was offered for this delay in filing the motion after the alleged asset purchase.

employer's former employees. <u>Jeld-Wen of Everett, Inc.</u>, 285 NLRB 118 fn. 1 (1987). Therefore, a successor employer is also the proper subject of a rerun election. See <u>Audubon Regional Medical Center</u>, 331 NLRB 374, 375, 377-380 (2000); <u>Norton Health Care, Inc.</u>, 350 NLRB 648, 648, 651 (2007).

In <u>Jeld-Wen</u>, the first election was set aside because of misconduct by a predecessor employer called Nord. Id. at 119. Strikers, who had begun an economic strike less than 12 months before the first election, and their replacements both voted in the first election. Challenges to the votes cast by economic strikers in the rerun election were sustained by a Regional Director because the strike had been ongoing for more than 12 months.

The Board overruled this decision because the first election did take place within 12 months after the commencement of the strike, and economic strikers would be disenfranchised by virtue of Nord's misconduct. <u>Jeld-Wen</u> at 120. Even though in <u>Jeld-Wen</u>, the purchase of the predecessor employer took place after the rerun election, the Board concluded that the "replaced economic strikers are eligible to vote in **any** rerun election necessitated by election misconduct." (emphasis added) Id. at 121. Thus, a successor employer can be the subject of a rerun election when the first election was set aside due to election misconduct, like the Respondent's misconduct in the instant cases.

In <u>Audubon Regional Medical Center</u>, 331 NLRB 374 (2000), the Board ordered that a successor employer be subject to a rerun election necessitated by the unfair labor practices committed by its predecessor. Id. at 375, 377-380. In that case, the initial election was held in 1994 pursuant to a stipulated election agreement. Id. at 374, fn. 4. After losing that election, the union filed objections to the election. The union also filed

several unfair labor practice charges alleging that violations were committed from 1994 through 1996.

In 1997, the ALJ in that case issued a decision, finding that the employer had committed various Section (a)(1) and (3) violations, and concluding that certain violations also constituted objectionable conduct warranting setting aside the 1994 election. Audubon Regional, 331 NLRB at 374-375. On September 1, 1998, the successor employer assumed ownership of the predecessor employer. Id. at 377-378. See also Norton Health Care, 350 NLRB at 648.

Despite the fact that a new entity purchased the assets of the employer and even though a stipulated election agreement had been signed by the predecessor employer, on June 22, 2000, the Board ordered a rerun election due to the predecessor employer's misconduct. Audubon Regional, 331 NLRB at 379-380. The Board also ordered the successor employer to comply with special notice and access remedies. Id.

Therefore, the existence of a stipulated election agreement in the present case is immaterial because the circumstances here involve remedial issues, not contractual concerns, as suggested by Fresh & Easy.

### IV. The cases cited by Fresh & Easy fail to support its contention that a rerun election is inappropriate.

The cases cited by Fresh & Easy are irrelevant in determining the issue of whether a rerun election is proper. Moreover, most of those cases do not even involve situations where a respondent was purchased by a new entity. For example, in <u>Highlands Regional Medical Center</u>, 327 NLRB 1049 (1999), the Board denied the employer's request for review of a Regional Director's order denying the employer's petition to revoke the

approval of or to modify a stipulated election agreement. The employer in that case was not permitted to modify an election agreement by including certain classifications, which the parties had previously agreed to exclude from the unit. Id. at 1049.

Another case relied upon by Fresh & Easy, <u>Tidewater Oil Company v. NLRB</u>, 358 F.2d 363 (2d Cir. 1966), did not address the issue of whether a successor employer is the proper subject of a rerun election ordered due to the predecessor employer's misconduct. There, the only issue before the court was whether the Board properly excluded the ballot of an employee on the basis that community of interest was lacking. Id. at 365. And the court held that the Board could not do so, because the evidence showed that the parties intended to include that employee in the bargaining unit. Id. at 366.

Sunnyvale Medical Clinic, 241 NLRB 1156 (1979) is likewise irrelevant to determining whether Fresh & Easy is obligated to hold a rerun election. In that case, the Board granted an employer's request to withdraw from a stipulated election agreement where an intervenor's relationship with the petitioner had a significant probability for creating confusion about the identities of both labor organizations on the ballot. Id. at 1158. The Board concluded that there was a grave possibility of confusion due to the unusual circumstance where the petitioner was formed by former officers of the intervenor shortly before the petition was filed. Id. at 1156-57.

Here, no similar situation exists, and no other union has intervened in the representation proceeding. Fresh & Easy's contention that employees will be confused because of the alleged asset purchase has no merit. The Board has noted that victims of employer misconduct perceive "no real change in the employing industry" when a new

employer replaces the former one. <u>Perma Vinyl</u>, 164 NLRB 968, 969 (1967). Thus, the situation here bears no resemblance to the unusual set of facts presented in <u>Sunnyvale</u>.

Because Fresh & Easy has failed to proffer any legal precedent holding that a rerun election cannot be conducted due to the alleged asset purchase or because of an election agreement, its unpersuasive arguments should be rejected, and its motion should be denied.

### V. If Fresh & Easy is a Golden State successor, it cannot evade its duty to remedy the misconduct of the Respondent.

It is well established that a successor employer is required to remedy its predecessor's unfair labor practices when the successor is on notice of the unfair labor practice charges against the predecessor, and the successor continued to operate the business in an essentially unchanged form. Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973).

In <u>Golden State</u>, the Court held that when the Board issues a remedial order against the predecessor employer, in order to fully effectuate the purposes of the Act, the successor employer may be obligated to comply with that order. Id. at 168. Here, the termination of Trespalacios constitutes both an unfair labor practice and objectionable election misconduct. The remedial order for such misconduct requires a rerun election.

In addition, public-policy principles require that a successor employer not be allowed to benefit from the unlawful conduct of its predecessor. Wyandanch Engine Rebuilders, Inc. 328 NLRB 866, 875 (1999); Perma Vinyl Corp., 164 NLRB at 969. A successor employer must remedy the predecessor's misconduct in order to erase the effects of such misconduct and so that employees can be reassured of their statutory rights. Id.

The Golden State Court noted that when "employees identify the new employers' labor practices with those of the predecessor but do not take collective action, the successor may benefit from the unfair labor practices due to a continuing deterrent effect on union activities." 414 U.S. at 184. Here, a rerun election imposed upon a successor employer is appropriate to prevent the successor employer from becoming the beneficiary of the Respondent's misconduct and to effectuate the remedial policies of the Act.

#### VI. Conclusion

For the foregoing reasons, the Acting General Counsel respectfully requests that Fresh & Easy's motion be denied in its entirety, and that the Board limit its present inquiry to the issues raised by the ALJ decision and the exceptions to that decision.

Respectfully submitted,

Irma Hernández

Counsel for the Acting

General Counsel

National Labor Relations Board

Region 21

Dated at Los Angeles, California, this 18<sup>th</sup> day of August, 2010.

#### STATEMENT OF SERVICE

I hereby certify that a copy of Counsel for the Acting General Counsel's Opposition to Fresh & Easy Neighborhood Market, Inc.'s Motion to Intervene and Supplement the Record in Cases 21-CA-38915, 21-CA-38932, and 21-RC-21137 was submitted by E-filing to the Office of the Executive Secretary of the National Labor Relations Board, on August 18, 2010. The following parties were served with a copy of the same documents by electronic mail.

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Dated at Los Angeles, California, this 18<sup>th</sup> day of August, 2010.